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Nos. 00-1751, 00-1777, 00-1779

IN THE

Supreme Court of the United States

SENEL TAYLOR, JOHNNIETTA MCGRADY, CHRISTINE SUMA, ARKELE WINSTON, AND AMY HUDOCK,

&

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION,

&

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF FOR THE CENTER FOR EDUCATION REFORM IN SUPPORT OF PETITIONERS

Of Counsel
JOSEPH E. SCHMITZ
GREGORY S. WALDEN
DANIEL R. VOLKMUTH
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6055

ROBERT A. DESTRO
Counsel of Record
SCHOOL OF LAW
CATHOLIC UNIVERSITY OF AMERICA
3600 John McCormack Road, N.E.
Washington, D.C. 20064
202-319-5140

Counsel for Amicus Curiae
The Center for Education Reform

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Nos. 00-1751, 00-1777, 00-1779

In the Supreme Court of the United States

Senel Taylor, Johnnietta McGrady, Christine Suma, Arkele Winston, and Amy Hudock

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Susan Tave Zelman, Superintendent of Public Instruction,

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Doris Simmons-Harris, *et al.*,

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AMICUS CURIAE BRIEF FOR THE CENTER FOR EDUCATION REFORM[1]

INTEREST OF AMICUS CURIAE[2]

The Center for Education Reform ("CER") is a national, independent, non-profit advocacy organization founded in 1993. CER provides support and guidance to parents and teachers, community and civic groups, policymakers, grassroots leaders, and all other interested citizens who are working to bring fundamental reforms to

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[1] Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover and the staff of The Center for Education Reform participated in authoring this brief. No entity other than The Center for Education Reform and its counsel provided financial support for this brief.

[2] The consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

their schools. It also supports the lawyers and litigants who strive to present an accurate picture of the social, cultural, educational, economic, and political facts supporting the constitutionality of these fundamental reforms.

In CER's experience, education reform is, at bottom, a restructuring of the goals and relationships that define the character of a school system or program. By definition, meaningful reform is rarely a discrete event. It is a difficult process that takes place over an extended period of time. *Successful* reforms require careful crafting. Those that succeed must address the social, economic, cultural, and educational needs and aspirations of the community.

Because each reform effort is unique, CER believes that the political and constitutional legitimacy of specific reforms should be considered only in the factual context that led to their implementation in the first instance. Lower courts, however, are deeply divided on the relevance and weight that should be allocated to the specific facts and factual contexts when education reform initiatives are tested under the Establishment Clause. Compare *Campbell v. Manchester Bd. Of School Directors*, 161 Vt. 441, 452-456, 641 A.2d 352, 359-361 (Vt. 1994) (detailing the facts relevant to the Establishment Clause inquiry); *Jackson v. Benson*, 218 Wis.2d 835, 869-873, 578 N.W.2d 602, 617-619 (1998), *cert. denied*, 525 U.S. 997 (1998) (detailed factual analysis of the Milwaukee School Choice Program); and *Kotterman v. Killian*, 193 Ariz. 273, 279-282, 972 P.2d 606, 612-615, *cert. denied*, 528 U.S. 921 (1999) (close analysis of factual background of state income tax credit for contributions to private scholarship programs) with *Bagley v. Raymond School Dep't*, 728 A.2d 127, 133-135, 144-145 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999) (acknowledging that the statute intentionally singled out religious schools for adverse treatment, but failing to examine the factual context); *Strout v. Albanese*, 178 F.3d

57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999) (same, failing to analyze the possibility that the statue had the primary effect of "inhibiting" religion).

This Court should grant the writ and provide the state and federal courts with guidance concerning the quality and quantum of evidence needed to plead and prove a violation of the incorporated Establishment Clause.

SUMMARY OF ARGUMENT

The effort to desegregate and reform the Cleveland Public Schools began more than twenty-five years ago. This case is the latest to test the constitutionality of numerous remedial "plans," millions of dollars in spending, and thousands of student and teacher re-assignments. After decades of judicial oversight of the state and local political struggles necessitated by the remedial orders put in place by the District Court, there is widespread agreement that the task of reforming the Cleveland's education system is far from complete. The Cleveland Public Schools attained "partial unitary" status with respect to student assignments only in 1999. *See Reed v. Rhodes*, 179 F. 3d 453 (6th Cir. 1999).

The Cleveland Scholarship and Tutoring Grant Program at issue in this case is an important component of an ongoing desegregation and school reform effort that has lasted for more than a generation. When the District Court "suggested that parental and student choice become an important factor in student assignment," *Reed v. Rhodes*, 179 F. 3d at 458, it was inevitable that private schools would be included in the effort to provide real options for Cleveland's children.

Also inevitable was litigation under the Establishment Clause. At bottom, the Establishment Clause argument by opponents of school choice is a simple one: To the extent

that a desegregation remedy permits parents and students to choose from the full range of educational opportunities in their community, including private and religiously affiliated schools, the Establishment Clause is violated.

Amicus CER respectfully submits that an inclusive funded school choice plan does not violate the Establishment Clause simply because it permits the choice of a religiously affiliated school, or because the educational marketplace may not have had time to offer the range of options contemplated by that plan. CER submits that plaintiffs in an Establishment Clause challenge bear the burden of pleading and proving every element of their claim. Where, as here, the plaintiffs rely on the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), they must prove by a preponderance of the evidence:

1. That the choice plan – taken as a whole and viewed in context – either has no secular legislative purpose, or that the alleged purpose of the statute is a cover for an [otherwise unconstitutional] attempt to advance or inhibit religion; or

2. That "the principal or primary effect of the statute" – read in the education reform and remedial context in which it was adopted – *actually* "advances [or] inhibits religion"; or

3. That the choice plan embedded in Ohio law *actually* "foster[s] an excessive entanglement with religion."

See Lemon, 403 U.S. at 612-13.

In the case at bar, the courts below held that plaintiffs had established the relevant "constitutional fact" – that the principal or primary effect of the Cleveland Scholarship

and Tutoring Grant Program "advanced" religion – by proving only: 1) that more than 80% of the students utilized their scholarships at religiously affiliated schools; 2) that the mission statements of those schools attest that they approach the task of education from a religious perspective; and 3) that the payments under the Scholarship Program were unrestricted. Evidence that the Cleveland Scholarship and Tutoring Grant Program is materially different in its purpose, genesis, design, operation, fiscal impact on parents and schools, and overall effect from the program challenged in *Committee for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756 (1973) was flatly rejected as "irrelevant." *See Simmons-Harris v. Zelman*, 234 F. 3d 945, 958 (6th Cir. 2000), *aff'g* 72 F. Supp. 2d 834, 848 (N.D. Ohio 1999) ("At the outset, we note that Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant.").

Amicus submits that where, as here, respondents assert that the challenged program "advances or inhibits religion," they must prove each of the elements of their Establishment Clause claim *as a matter of fact*, and that the District Court must give petitioners an opportunity to rebut. We agree with petitioners that this case presents "an important issue of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

INTRODUCTION

Serious efforts to reform public education in Cleveland began in 1973 with a federal desegregation lawsuit. In 1978, the District Court approved a 14-point desegregation plan that was designed to improve the quality of education for all students enrolled in the Cleveland Public Schools. Among other things, the plan opened up school assignments, implemented non-discriminatory testing and

tracking procedures, required significant efforts to improve reading scores, added magnet and vocational opportunities, upgraded and reorganized transportation, implemented stronger financial and management practices, and desegregated the teacher and professional staff assignments. *Reed v. Rhodes,* 422 F. Supp. 708, 797 (N.D. Ohio 1976), *remanded without opinion*, 559 F.2d 1220 (6th Cir. 1977), *on remand to* 455 F. Supp. 546 (N.D. Ohio), *on remand to* 455 F. Supp. 569 (N.D. Ohio 1978)(discussing the Liability Order) and *Reed v. Rhodes,* 455 F. Supp. 546, 568 (N.D. Ohio 1977), *on remand to* 455 F. Supp. 569 (N.D. Ohio 1978)(discussing the Remedial Order).

Political efforts for reform proceeded along a parallel track. In 1982, Cleveland voters elected reform-minded members to the School Board. That Board hired a new superintendent, Fred Holliday. Superintendent Holliday instituted a new automated attendance system, started a scheduling system and began making management changes. The Board also placed a tax levy on the ballot. It passed, giving the district its strongest financial position in years. Evelyn Theiss, "School Board Repeats Failed Reform Pattern," *The Cleveland Plain Dealer* (August 27, 1995) at 6B.

In 1983, an advisory panel recommended reform measures to the State Superintendent of Public Instruction. These included revisions to tenure laws, developing teacher competency tests, and raising teacher salaries. The panel also recommended school accreditation standards and graduation requirements, greater emphasis on math, science and technology, and an extension of the school year. Peggy Caldwell, "Ohio Panel Asks Change in Tenure Law, Teacher Certification Tests," *Education Week* (December 21, 1983).

In 1988, then-Superintendent of Cleveland Schools, Alfred D. Tutela, proposed expanding the district's reading

program, reducing the ratio of pupils to guidance counselors, converting high schools to theme or magnet schools, and implementing a "promotional gates" testing system as part of the desegregation plan. William Snider, "State Mandates, Equity Law: On a Collision Course," *Education Week* (February 10, 1988).

In 1991 and 1993, respectively, two slates of reform-minded candidates for the school board were elected with the backing of Mayor Michael R. White. Theiss, *supra.* Faced with numerous buildings in dangerous disrepair, the School Board implemented a comprehensive plan to address safety code violations on a priority basis. Funds from the desegregation lawsuit were funneled into the buildings with most pressing problems. Patrice Jones, "Schools Slide into Disrepair, District Has Enough to Fix Only the Worst," *Cleveland Plain Dealer* (September 11, 1994) at 1B.

The 1993 slate of candidates, known as the "Vision 21" team, called for the restructuring of grade levels in elementary and middle schools, Scott Stephens, "Parents Get Early Word on Schools," *Cleveland Plain Dealer* (May 19, 1998), but the Superintendent hired to implement the restructuring refused to make substantive educational and management changes despite demands from the Board to do so. Efforts also began in 1993 to reform the kindergarten through eighth grade curriculum with new math books, several classroom projects focusing on alternative teaching methods and efforts to retrain teachers in efforts to help students improve their achievement on the state-mandated proficiency tests. Patrice Jones, "9th Graders Falter on Proficiency Tests," *Cleveland Plain Dealer* (March 20, 1994), at 1B.

In 1994, the School Board took steps to curb rising violence in Cleveland schools. Scott Stephens, "School Board Unveils Steps to Curb Violence," *Cleveland Plain*

Dealer (October 29, 1994) at 1B. The State of Ohio also introduced minimum standards tests for graduating high school seniors set at a level of ninth grade proficiency. Jeanne Allen, *The School Reform Handbook*, Ch. 7, p. 62 (Center for Education Reform (Washington, D.C. 1995) (available at http://www.edreform.com/handbook/srhch7.htm.).

Despite these reform efforts, the federal court monitoring the desegregation plan ordered the State of Ohio to take over the Cleveland school district in 1995. Theiss, *supra*. On June 29, 1995, then-Governor George Voinovich signed into law the Cleveland Scholarship and Tutoring Grant Program. It was designed to provide educational choice through vouchers for Cleveland's low-income families, and provided full eligibility for families with an income 200% below the poverty line. The adoption of this program was the culmination of legislative efforts dating back to the late 1970s.

As a result of the "Vision 21" program, the takeover of the district, and the creation of numerous magnet schools, thousands of students have been reshuffled. In response, reforms of the school assignment and transportation were undertaken. Until 1997, the district's desegregation plan imposed strict racial balance guidelines on student assignments. Today assignments are based on the programs the students choose and on the neighborhoods in which they live. Stephens, "Parents Get Early Word on Schools," *supra*.

Changes were occurring in school finance as well. In 1997, the Ohio Supreme Court held that certain portions of Ohio's school funding formula were unconstitutional. *DeRolfe v. State* (*DeRolfe I*), 78 Ohio St.3d 193, 677 N.E.2d 733 (1997), *rehr'g. and clarification*, 78 Ohio St.3d 419, 678 N.E.2d 886 (1997), *clarification*, 83 Ohio St.3d 1212, 699 N.E.2d 518 (1998). The ruling in *DeRolfe I* was

designed to force major changes in the school funding program, its emphasis on the property tax as a primary source of school funds, the school foundation program that provides monetary support to the districts, the emergency school loan assistance program that allowed the districts to borrow money from commercial lenders, the spending reserve borrowing program that allowed the districts to borrow against amounts anticipated to be collected from property taxes, and the classroom facilities program.

Since the ruling in *DeRolfe I*, the Ohio Legislature has adopted numerous laws in an attempt to address the issues identified by the Ohio Supreme Court. On February 26, 1999, the trial court held that these laws did not remedy the violations of the Ohio Constitution. On May 11, 2000 the Ohio Supreme Court affirmed the findings of the trial court, and ordered that the state address seven specific problem areas: reliance on property taxes, the revised funding formula, facilities funding, the school solvency fund, unfunded mandates, phantom revenue, and academic guidelines. *DeRolfe v. State* (*DeRolfe II*), 89 Ohio St.3d 1, 728 N.E.2d 993 (2000). The Ohio Supreme Court retained jurisdiction of the case, and it remains pending.

Structural reforms have been enacted as well. In 2000, Governor Taft announced $1.6 million in grants for alternative schools and programs targeted at disruptive and habitually truant youth. Cuyahoga County, which includes Cleveland, received $150,000. "Governor Announces Additional $1.6 Million in Alternative Education Grants," Press Release, Ohio Department of Education (June 26, 2000, available at http://www.ode.state.oh.us/comm/news/06-26-00.htm). In December 2000, the State of Ohio adopted a teacher-testing program to begin in 2003. It will determine whether a beginning teacher can move from provisional status to professional status under the licensure provisions. "Ohio First in the Nation to Adopt New

Teacher Test," Press Release, Ohio Department of Education (December 14, 2000, available at http: //www.ode.state.oh.us/comm/news/dec_2000news/12-14-00a.htm). The State School Board also adopted new curriculum guidelines and new high school graduation requirements in 2000. "State Board Approves New School Operating Standards and Teacher Education Test," Press Release, Ohio Department of Education (December 12, 2000) (This press release is available at http://www.ode.state.oh.us/comm/news/dec_2000news/12-12-00.htm.)

ARGUMENT

I. THIS CASE PRESENTS THE BEST OPPORTUNITY SINCE *BOWEN V. KENDRICK* FOR THE COURT TO CLARIFY WHAT FACTS ARE RELEVANT TO THE PLEADING, PROOF, AND DEFENSE OF A CLAIM CHALLENGING STATE ACTION UNDER THE INCORPORATED ESTABLISHMENT CLAUSE.

Recent state and federal opinions dealing with Establishment Clause challenges to education reform programs reveal a stark contrast in the courts' approach to fact-based claims and defenses. In those cases where the courts are willing to examine the factual context and actual *operations* of education reform efforts that result in state payments to parents of children attending religiously affiliated schools, the programs have tended to survive scrutiny. *See Campbell v. Manchester Bd. Of School Directors*, 161 Vt. 441, 452-456, 641 A.2d 352, 359-361 (Vt. 1994); *Jackson v. Benson*, 218 Wis.2d 835, 869-873, 578 N.W.2d 602, 617-619 (1998), *cert. denied*, 525 U.S.

997 (1998); and *Kotterman v. Killian*, 193 Ariz. 273, 279-282, 972 P.2d 606, 612-615, *cert. denied*, 528 U.S. 921 (1999). In those instances where the analysis is largely doctrinal, evidence concerning the purpose, operation, context, or actual effects of the challenged program is either dismissed as "irrelevant" or ignored altogether. In this case, both the District Court and Sixth Circuit followed this pattern, treating the myriad factual and legal issues involved in this case as if the context in which they arose was largely irrelevant.

Education reform efforts have been going on in Cleveland, and in the State of Ohio generally, since the mid-1970s. These reforms – which include an ongoing desegregation case – were designed to provide the parents and children of Cleveland the "thorough and efficient system of common schools" promised in Article VI § 2 of the Ohio Constitution. Ohio Const. Art. VI §2. These efforts have been persistent and ongoing for at least 22 years, and now include limited funds to support parental and student choice of educational options outside of the troubled Cleveland Public Schools.

In the case at bar, the District Court held, correctly, that a showing that the Scholarship Program was serving an important secular goal "does not obviate this court's duty to further question whether the Program also has the direct and immediate effect of advancing religion." Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 848 (N.D. Ohio 1999), *aff'd* 234 F.3d 945 (6th Cir. 2000). From that point forward, however, it studiously ignored the constitutional significance of undisputed facts concerning the *actual* operations of the program, and concluded – on largely doctrinal grounds that did not permit rebuttal, that the relevant "constitutional fact" – that the Cleveland Scholarship Program "advanced religion" – had been proved.

The District Court did not, for example, question the fact that "educating [public school scholarship] students with such needs costs the [receiving] schools more than the payment they receive." 72 F. Supp. 2d at 849. Assuming, as we must under Rule 56 of the Federal Rules of Civil Procedure, that the court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir.1990), the "most favorable" conclusion that can be drawn from this undisputed fact is that when private schools accept scholarship students at rates below their normal cost of attendance, there is no subsidy to the school. The subsidy – in the form of a "tuition discount" below-cost – *runs in favor of the State*. The Cleveland Public Schools are subsidized as well, in that *all* costs associated with students in the Scholarship Program are borne by others.

Rule 56(c) states plainly that summary judgment is inappropriate unless there is "*no* genuine issue as to *any* material fact" (emphasis added). But there were many such disputes in the case at bar, including one implicit in the District Court's formulation of one of the key "constitutional fact issues" in this case: whether the Scholarship Program "benefits the participating schools *in such a way as to impermissibly foster* religion." 72 F. Supp. 2d at 849 (emphasis added) Given those disputes, it was incumbent on the *plaintiffs* – respondents in this Court – to prove, by a preponderance of the evidence, the *precise ways* in which the Scholarship Program "has the direct and immediate effect of advancing religion" 72 F. Supp. 2d at 848, citing *Nyquist*, 413 U.S. at 783 n. 39. The defendants were, in turn, entitled to rebut that evidence.

The panel opinion in the Sixth Circuit is even more blunt. No attention whatever is given to the ongoing struggle to desegregate Cleveland's schools, to State and local efforts to reform them in a manner that creates a unitary school system that meets the needs of the poor and underserved, or to the titanic political struggles over school finance that pit local school authorities against the State Legislature. For the Court of Appeals, the existence of "other options available to Cleveland parents such as the Community Schools is at best irrelevant." Simmons-Harris v. Zelman, 234 F.3d 945, 958 (2000). So too, apparently, is the *raison d'être* for the options made available to Cleveland parents and children: an *existing* constitutional mandate to reform a dual school system that isolates and victimizes the very children the Scholarship Program is designed to serve. *See generally Reed v. Rhodes*, 179 F.3d 453, 458 (6th Cir. 1999) *aff'g* 934 F.Supp. 1533 (N.D. Ohio 1996) [recounting at length the history of the Cleveland school desegregation litigation, and noting that the District Court had urged the parties "not to hesitate to think about innovative programs and undertakings 'that might ameliorate the situation in the school system.' *Reed v. Rhodes*, 1992 WL 80626, at *2 (N.D. Ohio Apr.2, 1992)."].

Other courts have taken an equally hostile attitude toward facts that this Court has held are clearly relevant in an Establishment Clause inquiry. In *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999), for example, the First Circuit professed to be "at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery" in a case where the State Legislature changed a neutral rule of general applicability into one that discriminates on the basis of religion. Accord *Bagley v. Raymond School Dep't*, 728 A.2d 127, 133-135, 144-145 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999) (acknowledging that the statute singled out *only* religious schools for adverse treatment). Unless the

"negative prohibition" in the "second prong" of *Lemon* is meaningless, *de jure* religious discrimination by government is one of the clearest cases where the intended "primary effect" of a statute is to *inhibit* or stigmatize religious belief, practice or association. Compare U.S. Const. Art. VI cl. 3 (prohibiting religious tests). *See generally* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674 (1987) (arguing that the No Religious Test Clause was the Constitution's first explicit prohibition of religious discrimination in federal employment – a practice that would have enabled the creation and maintenance of a political establishment selected by reference to religious belief or practice).

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court held that an Establishment Clause challenge is no different in kind from any other claim arising under the incorporated First Amendment. The duty of the District Court is to

> consider[] ... the evidence presented by [the parties] insofar as it sheds light on the manner in which the statute is presently being administered. It is the latter inquiry to which the court must direct itself on remand. ... As our previous discussion has indicated, and as *Tilton, Hunt,* and *Roemer* make clear, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

487 U.S. at 621. *See e.g., United States v. Playboy Entertainment, Inc.*, 120 S. Ct. 1878, 1891 (2000) (noting that the government had failed to make its case on the facts); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995) (appellate review of facts to decide whether petitioner's activity was

protected speech); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (holding that plaintiffs in both public- and private-figure cases concerning matters of public concern bear the burden of proof on the issue of falsity); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) (requiring "independent appellate review" of factual determinations that a libel defendant acted with actual malice). *See generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

Since *Kendrick*, this Court has consistently affirmed the importance of constitutional fact-finding in Establishment Clause litigation. *Good News Club v. Milford Central School*, -- U.S. -- (June 11, 2001), 2001 WL 636202; *Mitchell v. Helms*, 530 U.S. 593 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Board of Education of the Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994); *Zobrest v. Catalina Hills School District*, 509 U.S. 1 (1993).

The decisions below emphatically endorse a narrow and constitutionally erroneous approach to fact-finding in education reform cases having Establishment Clause elements. This Court should grant the writ, and take the opportunity to clarify what facts are relevant to the pleading, proof, and defense of a claim arising under the incorporated Establishment Clause. We agree with petitioners that this case presents "an important issue of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

II. THE COURT CAN AND SHOULD USE THIS CASE TO CLARIFY THE PURPOSES OF THE FACTUAL INQUIRIES MANDATED BY THE "THREE-PRONGED" TEST OF *LEMON V. KURTZMAN* AND ITS PROGENY.

Over the years since the Court synthesized its approach to Establishment Clause adjudication in *Lemon v. Kurtzman*'s "three-pronged" test[3], there has been a good deal of confusion concerning the relationship between and among the fact-based inquiries it requires.

In the decision below, the District Court conceded that the plaintiffs (respondents in this Court) did not challenge the "secular purpose" of the Cleveland Scholarship Program, but the clear implication of its analysis is that Ohio's *purpose* in enacting the Cleveland Scholarship Program was to benefit schools affiliated with religious groups.

Relying on a narrow reading of *Nyquist*, the District Court found that the primary *effect* of the Cleveland

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[3] The pedigree of the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), can be summarized as follows:

> " First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive governmental entanglement with religion." Walz [v. Tax Comm'n, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)].' " Lemon v. Kurtzman, 403 U.S., at 612-613, 91 S.Ct., at 2111-2112, quoted in Larson v. Valente, 456 U.S., at 252, 102 S.Ct., at 1687.

Scholarship Program was to provide substantial benefits for religiously affiliated schools, notwithstanding undisputed evidence that many of the schools lose money by accepting scholarship students. In the view of the District Court, this purported effect was so substantial that it supported a finding that the "function" of the Scholarship Program – i.e. its *purpose* – was "to provide assistance to private schools, the great majority of which are sectarian."

> Indeed, the Court's ultimate analysis of the *Nyquist* program under the "effects" test can be applied in this case by merely substituting "Ohio" for "New York": "[I]t is precisely the function of [Ohio's] law to provide assistance to private schools, the great majority of which are sectarian .... [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."

Amicus respectfully submits that there is a good deal of confusion in the courts below about the relationship between the "purpose" and "effect" inquiries under the Establishment Clause, and concerning the types and quantum of evidence necessary to prove, or rebut, such a claim.

The Cleveland Scholarship Program is part of an evolving 25-year program designed to bring the Cleveland Public Schools into compliance with a desegregation decree, and yet the Court of Appeals held that consideration of the complete education reform package is "irrelevant" to its inquiry under the Establishment Clause.

> Should we consider the Community Schools program in our analysis of the constitutionality of the school voucher program, we would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship

> programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children.

Simons-Harris v. Zelman, 234 F. 3d 945, 958 (6th Cir. 2000).

Amicus respectfully submits that to the extent that education reforms are a "necessary and proper" means of compliance with the Equal Protection Clause in a school desegregation context, they cannot, by definition, be "irrelevant" in a challenge to those reforms under the Establishment Clause. To the contrary, the options made available by the State of Ohio for Cleveland's children are directly relevant to the question of whether the Scholarship Program has a "primary effect" that advances religion.

Cleveland's public school children would not have these options *but for* the remedial orders and legislation that were a direct result of the desegregation case. The Scholarship Program is only one of those options, and should not be reviewed out of context, or in a manner that assumes the existence of facts that are not in the record. *See Simons-Harris v. Zelman*, 234 F. 3d 945, 959 (6th Cir. 2000) (citing a law review article "finding that voucher funding levels typically 'approximate[ ] the tuition level set by parochial schools [which] reflects subsidies from other sources'').

This Court should grant the writ, and hold that where, as here, plaintiffs rely on the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), or one of its variants, they must prove by a preponderance of the evidence:

1. That the statute – taken as a whole and viewed in context – either has no secular legislative purpose,

or that the alleged purpose of the statutory scheme at issue is a cover for an otherwise unconstitutional attempt to advance or inhibit religion; or

2. That "the principal or primary effect of the statute" – read in the education reform and remedial context in which it was adopted – "advances [or] inhibits religion" in a tangible or demonstrable way; or

3. That the *nature and degree* of any "entanglement with religion" under the statute is "excessive" given the nature and purpose of the programs involved.

In the case at bar, the District Court and Court of Appeals treated an essentially fact-based inquiry under the Establishment Clause as one of doctrine. All we know is that the majority of children enrolled in the Scholarship Program attend religiously affiliated schools, that some of the schools have mission statements that attest to their religious character, that there are other school choice options, and that the suburban school districts have not yet opted into the Scholarship Program. We do not know, on this record, *how* either an individual scholarship or the Scholarship Program as a whole *actually* (as opposed to theoretically) has the effect of "advancing religion," whether *parents and children* view their choices as "illusory," or whether the effects of the program as it exists today are the "primary effect" *of the statute* or simply a result of current, but changeable, education market conditions. Nor do we know – largely because the District Court did not appear to entertain the possibility of any outcome but a declaration of unconstitutionality under *Nyquist* – whether the defendants could produce evidence that would rebut its conclusions. They were not given the chance to do so. Nor were they permitted to demonstrate

that the exclusion of religiously affiliated schools might be problematic under either the Free Speech, Free Exercise, or Equal Protection Clauses. *Cf.* U.S. Const. Art. VI (No Religious Test Clause, as forbidding religious discrimination as a qualification for a public trust, such as the expenditure of scholarship money earmarked for secular education programs only).

Accordingly, *Amicus* submits that this Court should grant the writ. The factual context of this case presents the Court with an opportunity to examine an increasingly important question in the field of education reform. Education reform advocates, including the parties in this case, need to know how specific factual inquiries mandated by the Establishment, Free Exercise, Speech and Press, and Equal Protection Clauses support or undermine the constitutionality of a student assignment plan designed to remedy a violation of the Equal Protection Clause.

CONCLUSION

As this case provides an opportunity for the Court to clarify what facts are relevant to the pleading, proof, and defense of a claim arising under the incorporated Establishment Clause, as well as to clarify the relationships between and among the factual inquiries required in litigation under the Establishment, Free Exercise, Speech and Press, No Religious Test, and Equal Protection Clauses, *amicus curiae*, The Center for Education Reform, supports granting a writ of *certiorari*.

Respectfully submitted,

Of Counsel
Joseph E. Schmitz
Gregory S. Walden
Daniel R. Volkmuth
PATTON BOGGS LLP
2550 M Street NW
Washington, D.C. 20037
(202) 457-6055

Robert A. Destro
Counsel of Record
The Catholic University
of America
Columbus School of Law
Washington, D.C. 20064
202-319-5202

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